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IN THE

SUPREME COURT OF THE UNITED STATES

No. 486

TIDEWATER OIL COMPANY,
Petitioner,

vs.

GEORGE E. JACKSON and KARL B. JACKSON, Doing Business in Partnership As Jackson Brothers,
Respondents.

RESPONDENTS' BRIEF OPPOSING CERTIORARI

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RESPONDENTS' BRIEF OPPOSING CERTIORARI

STATEMENT OF THE CASE

Petitioner's Statement of the Case is incomplete. In summary form, the operative facts (found by the Trial Court and not disturbed on appeal) are as follows:

Respondents (called Jackson Bros.) are two brothers engaged in business as small independent drillers. In 1952, they commenced a well on a tract of land adjoining a large block of producing leases owned and operated by petitioner (called Tidewater). Because of limited finances, it took Jackson Bros. two years to finish drilling their first well. When finally completed however, the well was

a good one for the area, capable of making about fifty barrels of oil per day without any salt water. (A1-A3)[1] From 1954 to 1956, Jackson Bros. drilled eight more wells on their property, all of which were good wells ranging in productive capability from 40 to 90 barrels of oil per day per well. Only two of the wells made any salt water at all and they produced collectively, only 20 barrels of water per day. (A2)

At this juncture, Tidewater proposed that Jackson Bros. join in establishing a line of salt water injection wells along their common boundary. The wells on Tidewater's leases were twenty to thirty years old, had been depleted to the limit of primary production and were ready to be waterflooded. (A3-A5) Jackson Bros. refused to join in the project, and properly so, because it would have cost them $100,000 and would have damaged rather than benefited their wells which were still in the first stages of primary production. (A5-A6) Of course, it would benefit Tidewater to have its neighbor bear part of the expense of their waterflood injection program.

The refusal of Jackson Bros. to join in the line flood proposal was followed by a most extraordinary series of willful and deliberate acts by Tidewater engineers amounting to nothing less than a reprisal against a small operator who refused to follow the dictates of a major company. Under the pretense of making an offer to purchase the Jackson Bros.' property Tidewater engineers obtained copies of the Jackson Bros.' well logs. (A6) With this information in hand, Tidewater engineers drilled three wells as close to the Jackson Bros.' boundary as it was possible to move a rotary drilling rig. (A6-A7) The wells were[2]

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1 References to the record will be shown by page number in the Appendix to petitioner's brief.

2 Two wells were located 12' and one well 20' from the property line.

then completed in the same formation interval from which Jackson Bros.' wells produced and in the summer of 1956, Tidewater commenced to inject salt water at rates ranging from 300 to 600 barrels of water per day per well. (A7-A8)

The effects were immediate and disastrous. One of the Jackson Bros.' wells was flooded out within hours (A7); a second was flooded out within weeks. (A8) Jackson Bros. pleaded with Tidewater to shut down the injection wells, but the engineers and high officers of the company refused, although they had full knowledge of the damage being done. (A8)

Later, and after the decision of the Kansas Corporation Commission, Tidewater converted three of its own producing oil wells offsetting the south border of the Jackson Bros.' property to water input wells and commenced the same high rates of water injection along that boundary." (A10-A11)

In approximately 3½ years that intervened between the commencement of water injection and the trial of the damage suit in the Federal District Court, Tidewater injected almost one million barrels of salt water on the plaintiffs' property lines. (A11) The rates of injection maintained in these wells were, the Court found, "substantially in excess and frequently twice as high as the average rates of injection in similar wells on the surrounding property." (A12) At one point, to administer the *coup de grace* to two of Jackson Bros.' wells, Tidewater injected salt water at rates ranging from 1,000 to 1,400 barrels per well per day. (A14) This is to be compared with average water injection rates of approximately 110 barrels per day per well maintained by Tidewater on a nearby lease, where the only object was to conduct a waterflood, not flood out

neighbor's wells. (A12) In the same 3½-year period, Tidewater completely destroyed four of Jackson Bros.' wells and forced five more to the limit of economic production by reason of the excessive quantities of water they were forced to produce with the oil. In effect, by the time of trial, all nine of the original Jackson Bros.' wells had been destroyed. (A15-A16) Worse, yet, Jackson Bros. drilled six additional wells in the interior of their lease to replace those which were destroyed by salt water, but have had to continue to produce several of the original nine wells making enormous quantities of salt water in order to keep the salt water injected by Tidewater from invading and flooding out the interior wells. (A16)

Tidewater's officers and engineers were forced to admit at the trial, and the Court found, that they knew the Jackson Bros.' wells would be damaged by their injection program in the line wells and that the rates of injection maintained were excessive and unreasonable. (A20) In addition, the Trial Court concluded that the destruction of the Jackson Bros.' wells could have been avoided without additional expense or loss to Tidewater if it had initiated a reasonable line flood program and had employed moderate injection rates. (A19-A21)

The Trial Court found Tidewater guilty of a deliberate injury to Jackson Bros.' property, a tort consisting of conduct which was "without justifiable excuse and with a reckless and wanton disregard of the rights and property of the plaintiffs; and [that] the injury to the plaintiff's property could have been, and was in fact, foreseen and anticipated." (A20)

The foregoing is only a summary of the operative facts found by the Trial Court. The Findings of Fact (A1 to A21 of the Appendix) describe the factual situation in complete detail and we invite the Court's examination of

them for a better understanding of what occurred and the conclusions drawn by the Trial Court on the intent and conduct of Tidewater's officers and engineers.

It is true that on July 29, 1953, Tidewater obtained from the Kansas Corporation Commission, an order authorizing it to inject salt water for waterflooding purposes on the large block it owned in the area. The waterflood order did not, however, specify a location for any injection wells offsetting Jackson Bros.' property and at the time it was obtained, the Jackson Bros. had no producing wells on their property and were intermittently engaged in drilling their first well. The flood order was obtained without notice to Jackson Bros. (A4) It is also true that when Tidewater commenced water injection along the property line and the damage to the first of Jackson Bros.' wells became apparent, they initiated a proceeding before the Kansas Corporation Commission to obtain an order directing Tidewater to cease water injection.[1] (A41)

After a hearing, the Commission dismissed the proceeding brought by the Jackson Bros. and dissolved a temporary cease and desist order. However, contrary to what Tidewater now seeks to imply, the Commission did not determine that there was no injury to the Jackson Bros.' wells or property. It is clear in the opinion that the Commission denied relief to the Jackson Bros. on the following basis:

1. The jurisdiction of the Commission is limited by statute to conservation matters, viz.: the prohibition of waste in the production of oil and gas and the protection of correlative rights. (A45; A51)

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1. At this point, and at the time of the hearing before the Commission, Tidewater had just commenced injection and only a small fraction (6% to 7%) of the one million barrels had gone into the well.

2. No question of waste of natural resources was involved in the proceeding because, while producing wells might have flooded out, the oil was not lost but was pushed forward in the reservoir in which it was still confined and waiting to be captured. (A50)

3. The theory of correlative rights relates to withdrawals of oil or gas in such quantities as to injure the reservoir or result in disproportionate recovery by one operator (commonly called drainage between leases) which has never been the claim here. (A50-A51)

4. The Commission is not a proper forum to consider and determine claims for compensation or damage for injury to property and there was no justiciable controversy presented under the conservation laws. (A47-A48; A50-A51)

The Commission, in its Memorandum Opinion suggested that an action for damages for the flooding of producing wells might be available to the Jackson Bros., but must be brought in a Court of general jurisdiction. (A50)

Jackson Bros. carried the appeal from the Commission's ruling to the Supreme Court of the State of Kansas, which affirmed the findings and order of the Commission without any new issue in the case and on the same theories of law. The Supreme Court adopted the same "narrow" construction of the concept of correlative rights as being limited to questions of disproportionate withdrawals by producers from a common reservoir. (A59-A60)

SUMMARY OF RESPONDENTS' ARGUMENT

Respondents will argue that the judgment of the Court of Appeals is not in conflict with applicable State law, and certiorari ought not to be granted, for the following reasons:

1. Petitioner's entire argument is based on the erroneous proposition that the phrase "injury to correlative rights" is synonymous with "injury to property" in all forms. In fact, "correlative rights" is a term of very limited scope in the field of conservation of natural resources and bears no relationship to any of the elements of damage on which recovery in this case was based.

2. While petitioners have failed to cite a single authority from Kansas in support of their argument that the decision of the Court of Appeals was contrary to Kansas law, there are several cases in point which hold:

(a). An action for injunctive relief, such as the complaint to the Commission for a cease and desist order, is not a bar to a later action at law for damages between the same parties and on the same set of facts.

(b). Under Kansas law, administrative tribunals do not enjoy equal standing with courts of general jurisdiction and cannot render binding judgments on legal questions or adjudicate issues and rights of parties which are not wholly within their special area of competence or jurisdiction.

There is one recent Kansas case (*Renner v. Monsanto Chemical Co.*, 187 Kan. 158; 354 P.2d 326, squarely in point, which holds that the oil and gas conservation statutes and the conservation orders of the Corporation Commission provide no basis for the conclusion or implication that they supersede or bar the common law or traditional right of an aggrieved party to redress in courts of general jurisdiction.

3. It is the law in Kansas and other jurisdictions that the mere fact that an act was lawfully undertaken, as was the case with Tidewater's salt water injection

under the Commission waterflood order, does not relieve the actor of liability for harmful consequences of the act. This is especially true where the act is lawful under some statute of limited application such as oil and gas conservation statutes, but is also tortious and done with the deliberate intent to injure the property of another, which the Court found is the case here.

4. The judgment of the Court of Appeal in this case was that since the Kansas Corporation Commission possessed no power to adjudicate tort liability, the proceeding before the Commission and the Commission's order could not have the effect of depriving Jackson Bros. of their day in court for the injury to their producing oil and gas property and the wells located thereon. This is wholly in accord with the law in this State and elsewhere.

ARGUMENT.

We note, with some admiration, that counsel for petitioner Tidewater, have composed six apparently different statements of questions presented for review. In reality, however, there is but one question in this case and it is:

> Whether the order of the Kansas Corporation Commission (affirmed on appeal) dismissing a complaint for a cease and desist order to enjoin the continued injection of salt water along the boundary of a producing oil lease under a waterflood permit previously issued by the same Commission, is a bar to a later action for damages to the adjoining property and the wells located thereon, caused by the continued injection of water?

Similarly, there can be only one basis for invoking the jurisdiction of the Court on certiorari under Rule 19 which is:

Th.t the Court of Appeals which held (as did the Trial Court) that the Commission's order was not a bar, decided the question contrary to applicable State law.

There are several reasons why the decisions of the Court of Appeals and the District Court, on the basic issue, are both correct and in harmony with State law. These will be discussed under separate sub-topics.

1: The Commission's Determination That There Was No Injury to Correlative Rights Shown Was Not Tantamount to a Finding That There Was No Damage to Jackson-Bros.' Property.

Without saying so, counsel for Tidewater have, throughout their brief, used the term "correlative rights" as if it were synonymous with property or property rights.[1] From this point, the argument is made that the award of compensatory damages for injury to the Jackson Bros.' producing oil property and the wells thereon is necessarily and completely at odds with the finding of the Commission that no injury to [Jackson Bros.] correlative rights had been established. The Memorandum Opinion by the Commission leaves no room for such a play on words. In substance the general rules of the Commission define correlative rights as the right of each producer in a common reservoir to produce [withdraw oil or gas] only in such manner or amount as (1) Will not injure the reservoir; or (2) Cause undue drainage between developed

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1 In the first statement of the questions presented for review (Petitioner's Brief Page 3), Petitioner has invented the term "correlative property rights." The word "property" is not used in association with the term "correlative rights" in the conservation statutes, the rules of the Kansas Corporation Commission or in its opinion included in the Appendix.

leases.[1] In its opinion, the Commission gave this rule a strict literal interpretation so as to hold that Jackson Bros. had not stated or proved a cause of action under the Conservation laws and within its jurisdiction. The Commission said:

> "There is no ambiguity in the language of this definition. The theory of correlative rights relates to the *withdrawal* of gas or oil from a common reservoir in amounts disproportionate to the interest of the lessee owners.[3]
>
> The question of *withdrawals* from the common reservoir is not presented in this complaint involving the flooding of producing wells by water injected during a lawful waterflood operation.[2]
>
> * * *
>
> No waste of natural resources nor injury to correlative rights having been shown, it appears that the instant proceeding presents no justiciable matter for action by this Commission." (A51)

The Commission did not decide, nor did it imply, that injury to correlative rights is the only injury which may be done to a producing oil and gas property, for the Commission also said:

> "A hearing before this Commission is not a proper forum for allegations of compensatory damage inasmuch as Commission jurisdiction is by statute limited to the prohibition of waste in the production of crude oil and natural gas and the protection of correlative rights." (A47-A48)

* * *

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1. Rule 82-2-101; A50-A51.

2. The word "collateral" in the record at A51 should be "correlative".

3. Emphasis supplied.

> An action for damages for the flooding of producing wells may be available to the owners of such wells, but the forum for such a damage action is the courts, not this Commission." (A50)

Jackson Bros. did not contend in the damage suit brought in the United States District Court that they were entitled to recover by reason of either (1) injury to the reservoir; or (2) drainage of the Jackson Bros.' property by Tidewater. Recovery was not granted on either of these theories. The Trial Court made a detailed finding on this subject to the effect that the tortious injury to Jackson Bros.' property caused the following damage: (1) Increased equipment and operating expense due to the necessity of lifting and disposing of excessive quantities of water; (2) Loss of natural gas fuel for the pumping wells; (3) Acceleration of the time when the economic limit of production would be reached; (4) The destruction and loss of producing wells on the Jackson Bros.' property; and (5) The loss of substantial quantities of recoverable oil under the Barrier lease which was by-passed and watered off in the reservoir by the salt water injected by Tidewater. (A18)

In broad terms, one might be inclined to consider that the flooding of a producing well or the watering off of oil reserves could be classed as an injury to the reservoir, but the Commission held to the contrary when it said:

> "Producing wells may be flooded out in repressuring operations, but the oil is not lost; it is pushed forward by the injected water which displaced it in the reservoir. There is, therefore, no waste of the natural resource; it is still confined, waiting to be captured." (A50)

At this point in the opinion, the Commission observed that an action for damages might be available in the Courts,

The Court of Appeals was fully aware of the distinction between injury to "correlative rights," as narrowly defined by the Commission, and damage to property for which the Jackson Bros. were permitted to recover by the Trial Court. (A28)

"Once it is recognized that the phrase "injury to correlative rights" cannot be equated with the generally understood and broad concept of injury to property, the logic of petitioner's argument falls, for it is based on an erroneous premise. Not only the Court of Appeals and the District Court, but the Commission as well, cognized that the Commission had no jurisdiction to entertain claims for damage to property.[1] (A47-A48; A50-A51) It had no jurisdiction to determine and did not purport to pass upon the questions tried in the District Court.

On this issue the petitioner must fall victim to its own sword. If the rules of res judicata and estoppel by judgment have any application in this case, it must be to the disadvantage of Tidewater. In view of the Commission's determination that, notwithstanding the fact that producing wells owned by Jackson Bros. had been flooded out and the oil pushed ahead of the inrush of salt water, no justiciable controversy was presented under the conservation laws, Tidewater is in no position at this juncture, to contend that a determination that no injury to correlative rights has been shown is as broad as a finding that there was no damage to Jackson Bros.' property. Furthermore

1. The Trial Court's findings show that Tidewater did not rely upon the Commission to adjudicate its tort liability. At the time it started drilling the line wells, Tidewater, anticipating the damage it would do, sent one of its engineers to the Commission to inquire whether the water-flood permit would protect it from a claim for damages to Jackson Bros.' wells. The Commission refused to be committed on this question. (A9)

we must not overlook the fact that the Commission, in its opinion, affirmed by the Supreme Court, said: "An action for damages for the flooding of producing wells may be available to the owners of such wells but the forum for a damage action is the Courts, not this Commission." (A50). The Commission's order certainly must now be res judicata on what it had jurisdiction to hear and what it actually decided. If it is, Tidewater cannot argue that the Commission's order disposed of Jackson Bros.' claim for damages; for that matter has already been adjudicated against the petitioner.

2. The Decisions of the Court of Appeals and the District Court on the Issue of Estoppel by Judgment Are Not in Conflict with Applicable State Law.

Perhaps the Court has noticed that except for the opinion of the Supreme Court of Kansas in the appeal of the Commission proceeding (*Jackson* v. *State Corporation Commission*, 186 Kan. 6, 348 P.2d 613), counsel for petitioner have not cited a single Kansas decision to support their claim that the judgments of the Court of Appeals and the District Court holding that the Commission's order was not a bar to the damage suit are in conflict with applicable State law. This is the pivotal question at this stage in the proceeding. It is not because of a lack of decisions on the point that counsel for petitioner have failed to support their argument. There are several cases in point and the reason they were not cited is because they are squarely against the petitioner. The pertinent decisions fall into two categories and will, therefore, be reviewed separately.

(a) Under Kansas Law, an Action for Injunctive Relief Is Not a Bar to a Later Action for Damages on the Same Facts.

The complaint by Jackson Bros. to the Corporation Commission for a cease and desist order was nothing more than an application to an administrative body for injunctive relief. There was no prayer or claim for damages in the complaint to the Commission. (A41) Moreover, the Commission ruled that it had no jurisdiction to consider a claim for damages. (A27-A48) The rule is firmly established in this State that proceedings for injunctive relief do not bar a later suit for damages arising out of the same transaction.

A recent case directly in point is *Hoistetter* v. *Myers Construction, Inc.*, 170 Kan. 464, 227 P.2d 115 (1951). In that case a damage suit was brought for pollution of air by smokestack refuse from a portable asphalt plant. An adjoining householder claimed damage to his home. The defendant attempted to set up in defense a prior decree in an injunction suit between the same parties on the same nuisance. The defense was stricken on plaintiff's demurrer. The Supreme Court noted (p. 468 Kan. Rep.):

> "We have seen the trial court in the injunction action found many of the issues of fact adversely to the contentions of the plaintiffs in the damage action."

* * *

(p. 470)

> "* * * the only issue litigated in the injunction action was whether the plaintiffs in that action were entitled to certain equitable relief. The question of damages for the period of time for which damages were claimed in the damage action was not litigated. Without deciding whether an action for damages and an action for an injunction may be joined, suffice it to say that

> they were not joined in this case and in the injunction action there was no claim for damages, no evidence as to damages, and no finding as to damage. The demurrer to the supplemental answer was correctly sustained."

To the same effect is *The Chanute Brick & Tile Company* v. *The Gas Belt Fuel Co.*, 89 Kan. 177, 130 Pac. 649, where the court, in a per curiam decision, said:

> "The only issue litigated in the former action was whether the brick company was entitled to certain equitable relief. The question of damages for failure to furnish gas was not considered. The former judgment therefore could not be pleaded as a defense to the present action."

It may be true that a contrary rule exists in other jurisdictions as indicated by some of the cases cited by petitioner from other states, but the rule in *Hoistetter* has been consistently applied in Kansas.[1]

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1. *Stroup* v. *Pepper*, 69 Kan. 241, 79 Pac. 825; *Atchison & Eastern Bridge Co.* v. *Atchison County Commissioners*, 150 Kan. 24, 91 P.2d 34; *Smith* v. *Russ*, 184 Kan. 773, 339 P.2d 286; *Haynes Hardware Co.* v. *Western Casualty & Surety Co.*, 156 Kan. 356, 366, 133 P.2d 574; *Probst* v. *Weigand*, 133 Kan. 232, 236, 299 Pac. 611; *Kinsey* v. *Farmers State Bank*, 132 Kan. 694, 700, 297 Pac. 693; *Brinkerhoff* v. *Home Trust & Savings Bank*, 109 Kan. 700, 705, 205 Pac. 779. In the latter case, the Court quoted the following from a work on estoppel:

> "For estoppel by judgment results from a matter having been directly and substantially in issue in a former suit, and having been heard and finally decided."

See also: *Security Insurance Company of New Haven* v. *Johnson*, 276 F.2d 182, 186-187 (10th Cir. 1960); Scott, *Collateral Estoppel by Judgment*, 56 Har. L. Rev. 1; 29 (1942)

(b) Under Kansas Law, Administrative Proceedings Do Not Constitute a Bar or Estoppel to Actions in Courts of General Jurisdictions.

Again, whatever may be the rule elsewhere, it has been established in Kansas that administrative bodies (and specifically the Kansas Corporation Commission) do not have authority to render binding judgments on legal questions.[1] In *Gas Service Co.* v. *Consolidated Gas Utilities Corporation*, 145 Kan. 423, 65 P.2d 584, two utilities prosecuted several actions to determine conflicting claims to service territory in the City of Wichita. In the case cited, an attack was made upon the validity of a City Ordinance on which one utility relied. This attack was met with the defense that the validity of the Ordinances had been passed and adjudicated in a prior case between the same parties carried to the Supreme Court. In rejecting the defense, the Supreme Court of Kansas said (P. 435 Kan. Rep.):

> "Even if the question of whether the Ordinances had been passed in conformance with the statute had been presented to the Commission, the decision of that tribunal on the question would not have had the binding effect of a judicial determination. Administrative bodies such as utilities commissions are not courts and do not have authority to render binding judgments on legal questions."[2]

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1. This is not to say, as the Court of Appeals observed (A30), that an administrative tribunal may not render a binding judgment in areas wholly within its jurisdiction; but, on the other hand, an administrative tribunal in this State cannot bind litigants on issues outside its jurisdiction or question of law not within its special competence.

2. The Commission referred to is the Kansas Corporation Commission, then called the Public Utilities Commission which regulates public utilities, common carriers and administers the conservation laws of this State.

Similarly, the Supreme Court of Kansas held earlier, in *State ex rel. v. Public Service Comm.*, 135 Kan. 491, 495, 11 P.2d 999:

> "As generally understood a court is a judicial tribunal which has power to hear and decide justiciable controversies and to give binding judgments thereon. The powers conferred on the commission by the statute under scrutiny do not extend so far. By its terms the commission is authorized to investigate complaints concerning unjust rates which the carriers have exacted and to make a certificate as to what is or would have been a just rate; but the commission is not authorized to make binding adjudications of right between carrier and complainant."

A very recent case squarely in point, and in the area of the commission's administration of the oil and gas conservation laws, is *Renner v. Monsanto Chemical Co.*, 187 Kan. 158, 354 P.2d 326. A landowner brought an action to cancel an oil and gas lease insofar as it covered a twenty-acre tract of land for violation of the implied covenants to develop the property and protect it against drainage from offset wells. The Trial Court entered an alternative decree giving the lessees 120 days to drill and complete a well or forfeit the lease.

On appeal, the defendants asserted, as an impregnable defense, that an order of the Corporation Commission had been entered under the proration statutes attributing the twenty-acre tract in question to producing wells located elsewhere on the lease. The well spacing pattern set up by the lessees had been submitted to the Commission and approved by it and the acreage in question was attributed to wells under the proration formula and allowables assigned accordingly. Therefore, it was argued, the lease was fully developed with all locations drilled and, as a

matter of law, the lessees had no further obligation to drill on the property.

The Supreme Court refused to accept this defense. It pointed out that the Commission had limited jurisdiction and that the conservation statutes empowered the Commission to attribute acreage to producing wells and fix allowables only for the purpose of preventing waste and protecting correlative rights. The Court went on to say (p. 174, Kan. Rep.):

> "We think it clear that, from a consideration of the statute, oil proration orders of the Commission do not in any manner alter the lessee's obligation under the implied covenant to drill additional wells to protect the premises against drainage. Manifestly, the statute provides no basis for the supersession of that duty, and affords no inference that a landowner must submit to uncompensated drainage without the possibility of exacting protection from his lessee."

If the conservation laws afford no inference that a landowner must submit to uncompensated drainage of oil and gas from under his property, it is difficult to imagine why the same statutes would require that an adjoining property owner, be he lessee or landowner, must be required to submit to the negligent or willful destruction of his property through the injection of water under a flood order. The question of drainage across lease lines through withdrawals of oil or gas on adjoining property is more closely connected with the concept of correlative rights as expressed in the conservation laws than is the movement of oil across lease lines occasioned or prevented by the injection of fluids for repressuring purposes.

In the final analysis, *Renner v. Monsanto Chemical Co.* stands for the proposition that the Supreme Court of Kansas is unwilling to hand over to the Corporation Com-

mission the traditional jurisdiction and remedies of courts of general jurisdiction in this State. We submit, this is as it should be. It has been the attitude of courts in other jurisdictions.[1] Consistent with this general policy, our Supreme Court has repeatedly held that the rule of res judicata (a rule which is broader than estoppel by judgment) does not apply to decisions of administrative bodies.[2]

3. The Fact That the Operation of the Water Injection Wells Was Lawful under the Oil and Gas Conservation Laws Is Not a Defense to an Action for Damages to Adjoining Property Caused Thereby.

When correctly analyzed, the opinion of the Kansas Corporation Commission held only that the injection of water in the wells along the property line was lawful under the conservation statutes and the rules of the Commission. (A50-A51) But, as the Court of Appeals said, "the fact that an act is lawfully undertaken and lawfully done, does not, *ipso facto*, relieve the actor of liability for the harmful consequences of his act." (A32) This is unquestionably

1. "*Lone Star Gas Co.* v. *Murchison*, (Tex. Civ. App.) 353 S.W.2d 870, 881; *Magnolia Petroleum Co.* v. *Railroad Comm.*, 141 Tex. 96, 170 S.W.2d 189. In the *Murchison* case, the Court said: 'The Railroad Commission is nothing but an administrative body appropriately clothed with authority to perform salutary functions of economic nature for the conservation of natural products. Its function is to administer conservation laws only and not to take the place of courts in their historical jurisdictional field.' (p. 881). *See Bills* v. *LeFlore County Gas & Electric Co.*, 166 Okla. 130, 26 P.2d 149, 151 (Okla.)."

2. *Coffman* v. *Hall*, 107 Kan. 188, 190 Pac. 761; *Kurn* v. *Miami County Commissioners*, 141 Kan. 7, 39 P.2d 321; *Warburton* v. *Warkentin*, 185 Kan. 468, 345 P.2d 992.

the law in Kansas and for that reason, if for no other, the opinion of the Court of Appeals is clearly in accord with the applicable State law, not in conflict with it.

In *Helms* v. *Eastern Kansas Oil Company*, 102 Kan. 164, 169 Pac. 208, a plaintiff instituted a suit for damages to his farm resulting from the escape of oil and sediments from the defendant's refinery, located on adjoining property, into a water course which passed across the plaintiff's land. The defendant interposed the defense that since it was conducting a lawful business on its own property it could not be held liable, particularly since the plaintiff failed to show negligence. On this issue the Supreme Court of Kansas quoted *Hauck* v. *Pipe Line Co., Ltd.*, 153 Pa. St. 366, 375 (p. 168 Kan. Rep.):

> "If the mere fact that the business is a lawful business, and has been conducted with care, would be a defense where a neighbor's land had been injured in consequence of the business carried on there, the escape of gas for instance, or the escape of oil, the result would be that a man might lose his farm; might be compelled to leave it, and have no compensation, simply because the business which brought about this loss was a lawful business, and was carried on carefully. This is not the law. No man's property can be taken, directly or indirectly, without compensation under the law of this state. Hence, there are cases, and a great many of them, where a defendant is held liable in damages, although his business is lawful, and he has exercised care in carrying it on."

In another line of cases the Supreme Court of Kansas has held that one using dynamite will be held responsible for damage to adjoining property from shock or debris, and this is true even where, as in the case of railroad companies, a permit has been obtained from the City Engineer, or other in authority, after tests had been made to determine

that blasting can safely and legally be done. *City of Cherryvale* v. *Studywin*, 76 Kan. 285, 91 Pac. 60; *Rost* v. *Railroad Co.*, 95 Kan. 713, 149 Pac. 679; *Bacon* v. *Railway Co.*, 109 Kan. 234, 198 Pac. 942.

There are many similar examples from other jurisdictions (several involving oil and gas cases) where defendants engaged in otherwise lawful activities, have been held accountable for damage to adjoining property. *Gulf Oil Corporation* v. *Hughes*, 271 P.2d 81 (Okla.); *West Edmond Salt Water Disposal Corporation* v. *Rosecrans*, 204 Okla. 9, 226 P.2d 965; *West Edmond Hunton Lime Unit* v. *Lillard*, 265 P.2d 730 (Okla.); *City of Muskogee* v. *Hancock*, 58 Okla. 1, 158 Pac. 622; *Comanche Duke Oil Co.* v. *Texas Pacific Coal & Oil Co.*, 298 S.W. 554 (Tex. Civ. App.); *Atkinson* v. *Virginia Oil & Gas Co.*, 72 W. Va. 707, 79 S.E. 647; *Miles* v. *A. Arena & Co.*, 23 Cal. App. 680, 73 P.2d 1260; *Parks* v. *Atwood Crop Dusters*, 118 Cal. App. 368, 257 P.2d 653; *Petillo* v. *Kennedy & Smith, Inc.*, 31 N.Y.S.2d 481; *Green* v. *General Petroleum Corporation*, 205 Cal. 328, 270 Pac. 952; *Higgins Oil & Fuel Co.* v. *Guaranty Oil Co.*, 145 La. 233, 82 So. 206.

4. The Judgment of the Court of Appeals That the Commission, Which Possessed No Power to Adjudicate Tort Liability, Could Not Deprive a Tort Claimant of His Day in Court Is Not in Conflict with State Law.

We do not understand petitioner to challenge the accuracy or the finality of the Commission's conclusion that it was without jurisdiction to consider or render judgment on claims for damages on injury to property. (A50) Neither does the petitioner assert, categorically, that an administrative agency, cloaked only with authority to consider controversies under the oil and gas conservation

laws, can authorize one producer to destroy the property of another, willfully or negligently, without responsibility for the tortious act. Counsel have carefully avoided a bold statement on this issue for the plain reason that it would place them completely at odds with the constitutional prohibition that "no man's property can be taken directly or indirectly without compensation." *Helms* v. *Eastern Kansas Oil Company*,[1] *supra*.

The Court of Appeals recognized that petitioner's weasel-worded argument that the determination of Jackson Bros.' "correlative rights" by the Commission was tantamount to a final adjudication of every issue in the damage action led inescapably to the announcement of a rule that no court has yet been willing to embrace: "That a tribunal, possessing no power to adjudge tort liability, may nevertheless deprive a tort claimant of his day in court on that issue, by conclusive adjudication of the operative facts upon which his claim must rest." (A32) Petitioner has not cited one case from Kansas or from any other jurisdiction which goes so far. The view expressed by the Court of Appeals is not only clearly in accord with the law in Kansas, but in harmony with the most fundamental notions of justice and fair play. *Helms* v. *Eastern Kansas Oil Company*,[2] *supra*; Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 18 *et seq*.

CONCLUSION

Although the amount of the judgment is large, the fact remains that this is nothing more than a tort suit between private litigants, brought in Federal Court on diversity

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1. 102 Kan. 164, 169 Pac. 208.

2. 102 Kan. 164, 169 Pac. 208.

jurisdiction. It is of no consequence to anyone except the plaintiffs and the defendant. The alleged conflict between the judgments of the Federal Courts and the Kansas Corporation Commission is, like petitioner's interpretation of "correlative rights", manufactured for the benefit of Tidewater; a product of the ingenuity of imaginative counsel. The Kansas Corporation Commission is not a party to this action and it is not concerned with it. The Commission's order has not been attacked nor has the waterflood, for which it issued a permit, been enjoined or interfered with. The Commission has not sought to intervene, appear or file briefs at any stage in this litigation.

We submit that petitioner has come to invoke jurisdiction of the Court with a petition and an argument which do not accurately and fully present the law of Kansas. Petitioner has failed to sustain the burden of showing that the judgments of the Court of Appeals and the District Court are in conflict with the applicable law of Kansas. For these reasons, we urge that certiorari should properly be denied.

Respectfully submitted.

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